85-992

Case No. 83-1814

Supreme Court, U.S.
FILED
NOV 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

UNITED STATES SUPREME COURT

October, 1985 Term

CHARLES FREESE, Next Friend for HEIDI FREESE and Individually, and RENATE FREESE, Jointly and Severally,

Petitioners for Writ of Certiorari

vs.

CORNING GLASS WORKS, a New York Corporation,

Respondent

On Appeal from the United States District Court-Eastern District of Michigan; On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX
PROOF OF SERVICE

Submitted by:

JERRY L. SUMPTER, J.D.
Attorney for Petitioners
P.O.Box 286
Cheboygan, Michigan 49721
Phone: (616) 627-7167

STATEMENT OF QUESTIONS PRESENTED

I. IS IT TIME TO REVERSE THE RULE OF LAW THAT REQUIRES PLAINTIFF TO MOVE FOR CONTINUANCE AT THE TIME HE IS CONFRONTED WITH AN UNDISCLOSED DEFENSE THEORY, EVEN AFTER PLAINTIFF HAS VIGOROUSLY ATTEMPTED TO DISCOVER SAME THROUGH MANY DISCOVERY METHODS?

Petitioner says	"Yes"
Respondent says	"No"
Trial Court says	"No"
U.S. 6th Circuit Court says	"No"

LIST OF PARTIES[1]

---

[1] Only parties listed in the caption seek review from the judgment of the U.S. Court of Appeals, Sixth Circuit.

TABLE OF CONTENTS

Page

Statement of Questions Presented i

Table of Contents ii

Index of Authorities iii

Statement of Grounds Which Jurisdiction of Court Invoked 1

Concise Statement of the Case
(i) Facts Material to the Consideration of the Questions Presented 3

(ii) Basis for Federal Jurisdiction in the Court of First Instance 6

Statement of Facts 7

Argument 11

I. IT IS TIME TO REVERSE THE RULE OF LAW THAT REQUIRES PLAINTIFF TO MOVE FOR CONTINUANCE AT THE TIME HE IS CONFRONTED WITH AN UNDISCLOSED DEFENSE THEORY, EVEN AFTER PLAINTIFF HAS VIGOROUSLY ATTEMPTED TO DISCOVER SAME THROUGH MANY DISCOVERY TECHNIQUES 12

Conclusion 39

Relief Sought 39

INDEX OF AUTHORITIES

Cases	Page
Beverino v Saydjari, 574 F2d 676 (CA NY, 1978)	29
Burton v Weyerhauser Timber Co, 1 F.R.D.571 (D.Or. 1949). . . .	15
Byce v American Honda Motor Co Inc, 59 FRD 63 (DC PA, 1971 . .	29
Colonial Book Co v Amsco School Publications, 48 F Supp 794 (SD NY, 1942), affirmed 142 F2d 362 (CA 2d, 1944)	28
Commercial Credit Corp v Pepper, 187 F2d 71 (CA 5th 1951). . . .	28
Hard v Stevens, 65 FRD 637 (DC PA 1975)	29
James v Pennsylvania R Co, 35 F Supp 1017 (ED NY, 1940). .	28
Mac Mullen v Hallden, 51 Mich App 176, 2 NW2d 856 (1974)	11
Melanson Company v Hupp Corporation, 391 F2d 902 (1968)	13
Montgomery Ward v Duncan, 311 US 243, 61 S Ct 189, 85 L Ed 147 (1940)	27
Moylan v Siciliano, 292 F2d 704 (1961)	13

Index Of Authorities (Cont'd)

Cases — Page

Norton v City Bank & Trust Co, 294 F 839 (CA 4th 1923) . . . 29

Pakech v American Export-Isbrandtsen Lines Inc, 69 FRD 534 (1976) 14, 29

Taggart v Vermont Transportation Company, 32 F.R.D.587, 588 (E.D. Pa. 1963)(aff'd 325 F2d 1022 (3d Cir 1964) 16

Talon, Inc.v Union Slide Fastener, Inc., 9 Cir., 1959, 266 F.2d 731 14

Court Rules

FRCP 16 15

FRCP, 26(e) 3, 26, 35

FRCP 59 27

FRCP 60(b) 28

Miscellaneous

3 Moore's Federal Practice Sec. 16.11 15

6A Moore's Federal Practice Sec 59.08[2] 17

Moore's Federal Practice, Rule 59 28

STATEMENT OF GROUNDS WHICH JURISDICTION OF COURT INVOKED

(i) The Date of Judgment of trial court was December 30, 1982.

(ii) The Date of Order of the U.S. District Court, 6th Circuit to be reviewed was July 17, 1985

(iii) The Date of the Order Denying Rehearing In Banc was August 28, 1985

(iv) The statutory provision which confers the jurisdiction, to review the judgment on the Supreme Court of the United States is U.S. Constitution, Article 3, Section 2 which extends to cases between citizens of different states. A person on one side of the lawsuit is from one state and the person on the other side of the is from another state. Here, Plaintiffs are Michigan citizens and Defendant is a New York Corporation, authorized and

doing business under the laws of the State of New York, and has as its principal place of business, an office in Corning, New York, 14830

CONCISE STATEMENT OF THE CASE

(i) Facts Material to the Consideration of the Questions Presented.

Defendant provided false answers to interrogatories in that defendant represented to plaintiff in no uncertain terms the product in question was manufactured up until 1978 (just prior to injury) and then at trial, over vigorous objection, Defendant ambushed Plaintiff with thentofore undisclosed exhibits that tended to prove the product was last manufactured in 1971.

Although required by FRCP 26(e)(2), Defendant made no attempt to satisfy its obligation to supplement its answers to interrogatories when it knew or should have known that the answers provided plaintiff and upon which plaintiff was relying were unequivocally false. Defendant offered into evidence, and the court received, over vigorous objection, several exhibits which were not disclosed prior to trial and which

exhibits established a completely different theory of defense than had ever before been disclosed in pleadings or during pretrial procedures.

The undisclosed exhibits and new theory was received into evidence over objection, even though plaintiff had specifically moved the court well prior to trial for an order allowing plaintiff to see defendant's exhibits and which motion was denied.

The trial court denied plaintiff's motion for new trial and the Court of Appeals, during oral argument, denied plaintiff's appeal on the basis of stare decisis in that plaintiff had not moved for a continuance when confronted with the undisclosed theory and exhibits. Plaintiff did not move for a continuance because: (a) she lived 175 miles from the trial situs, (b) the expense sustained by plaintiff to that point in time was horrendous, (c) the court had once before scheduled trial wherein plaintiff had to, at

great expense, assemble her experts from thousands of miles away and the court then adjourned the case over objection, (d) the burden was too great for plaintiff to move for a continuance and attempt to reassemble her proofs, and (e) trial dates in civil personal injury cases before the trial court were extremely difficult to come by. (The trial court shortly thereafter went into Senior status.)

It is time the rule that Plaintiff must move for a continuance under such circumstances be overturned and it is time for the defendant to bear the burden of its misdeeds in circumstances where the defendant totally ambushes the plaintiff at trial with undisclosed exhibits and defenses. Plaintiff's hands are completely clean in this case in that Plaintiff diligently pursued discovery in her case. Plaintiff should not be punished for defendant's misdeeds and suffer defeat in her case when she had

nothing to do, nor in any way contributed to the circumstances giving rise to the requirement that plaintiff move for a continuance when faced with undisclosed exhibits and theory of defense undetectable from the pleadings and pretrial procedures.

In summary, Defendant did everything wrong and Plaintiff is blameless, yet lower courts have turned a deaf ear to her plight because of stare decisis, i.e., she did not move for a continuance in the face of Defendant's misdeeds. For these reasons, Plaintiff-Appellant feels judicial discretion should be used to grant certiorari in this case.

(ii) Basis for Federal Jurisdiction in the Court of First Instance.

The basis for federal jurisdiction in the court of first instance was diversity of citizenship, Plaintiffs being citizens of the State of Michigan and Defendant being a New

York authorized corporation with its principal place of business in New York. Judgment was entered against Plaintiff on December 30, 1982, subsequent to a jury verdict of no cause of action in the United States District Court for the Eastern District of Michigan, Northern Division. Plaintiff filed a direct claim of appeal to the United States Court of Appeals for the Sixth Circuit and this appeal was denied per Court Order of July 17, 1985. Plaintiff requested a rehearing in banc, which was denied by order on August 28, 1985. Plaintiff now seeks leave to appeal to the Supreme Court of the United States by Petition for Certiorari.

STATEMENT OF FACTS

Charles Freese, father of Heidi Freese and, at the time of the incident giving

rise to this suit, husband of Renate Freese[2], Heidi's mother, since October 10, 1968, owns and operates a snowmobile/motorcyle shop under the name of White's Sales and Service in Cheboygan, Michigan. (Transcript, 368, 370, hereafter Tr).

Sometime prior to August, 1979, Mrs. Freese purchased a glass coffee carafe Model 8008 from the local Ace Hardware store. (Tr 374) The carafe was used at their place of business. The carafe had been manufactured by the defendant Corning Glass Works. (Tr 498-500) On January 11, 1980 (Tr 379) Heidi Freese used the carafe. She "went to make a cup of hot tea and I picked it up from the stove and the bottom fell out." (Tr 468) She did nothing out of the ordinary when handling the carafe. (Tr 469) Heidi's parents took her to the local hospital (Tr

---

[2] Mr. and Mrs. Freese were divorced before the trial of this case. Mr. Freese has custody of Heidi. (TR 369).

381-382), when she was treated in Emergency by Dr. R.K. Homsi. Heidi had sustained "burns on her right thigh from spilled hot water, boiling water, and she was quite a bit pained and she was crying and screaming in emergency room." (tr 127) "Hypertrophic scars caused by deep burns" (Tr 129) remain. This is an "excessive scar, overgrowth of a scar" (Tr 130) with a "discoloration" that will not "completely return to normal flesh color." (Tr 130) ". . . cosmetic surgery could improve on removing these ugly scars and trying to make the more acceptable line of scar" (TR 134), but could not "remove all visual signs of this injury." (Tr 135) The cost of cosmetic surgery could be "about $2,000.00, maybe it goes up to three or more." (Tr 135)

Within a few days after the incident with defendant's carafe, Mr. Freese sought the assistance and guidance of Counsel, (Tr 395), and a Complaint was filed March 6, 1980.

Count I alleged breach of express warranty; Count II alleged breach of implied warranty. A first Amended Complaint added a Count III: Negligence. The docket sheet of the District Court shows active and extensive discovery, during which period some conflict arose between the adversaries. It also became evident during the trial, as will be more fully described later in this Brief, that the defendant, during discovery, concealed/failed to accurately disclose information pertinent to the prosecution of this case. Plaintiff, during discovery, had diligently sought pertinent information, but in certain instances, infra, was effectively stonewalled to the point where time frames set by the trial court lapsed, and plaintiff's motion seeking the Court's aid were thereafter denied.

The case proceeded to trial before a jury, beginning December 10, 1982. A verdict for the Defendant of "no cause of action" was

rendered on December 20, 1982. On January 10, 1983, plaintiff filed a Motion for New Trial. The Memorandum Opinion and Order denying the Motion was entered November 17, 1982. An appeal was filed November 28, 1983 and denied per Court Order dated July 17, 1985.

Plaintiff entered a request for a rehearing in which was denied per court Order dated August 28, 1985.

ARGUMENT

The reason the Supreme Court should allow this writ of certiorari is that it is time for the law to change. Under Stare Decisis, the courts will follow a rule and be reluctant to change it. In Mac Mullen v Halliden, 51 Mich App 176, 2 NW2d 856, (1974) a law was meaningless due to a century of change in the world but stare decisis still applied until the courts finally overturned the law. If a

law is ripe for change, it should be changed or there will build a reluctance to challenge a law that has years of cases as precedent and stare decisis behind it. This will lead to following a law without thought. Plaintiff believes the law is ripe for change in the present case. Defendant should not be allowed to withhold items sought to be discovered and then surprise Plaintiff with them at trial.

I. IT IS TIME TO REVERSE THE RULE OF LAW THAT REQUIRES PLAINTIFF TO MOVE FOR CONTINUANCE AT THE TIME HE IS CONFRONTED WITH AN UNDISCLOSED DEFENSE THEORY, EVEN AFTER PLAINTIFF HAS VIGOROUSLY ATTEMPTED TO DISCOVER SAME THROUGH MANY DISCOVERY TECHNIQUES.

A. FAILURE TO MOVE FOR A CONTINUANCE

In the instant case, a fair trial for plaintiffs was prevented by defendant's misconduct during discovery.

In its Memorandum Opinion and Order, dated November 17, 1983, denying plaintiff's

Motion for New Trial, the trial court, "without approving non-disclosure of alternative defenses in the Joint Final Pretrial Statement or at the pretrial conference. . . .

" concluded that "no prejudicial surprise resulted to plaintiff," and that plaintiff's failure "to move for a continuance at the time of the surprise, or at any time. . . is generally construed as a waiver of any objection to the allegedly surprising and prejudicial evidence.

The issue of plaintiffs' trial counsel failing to move for a continuance at trial was raised in defendant's brief. Defendant's cited Melanson Company v Hupp Corporation, 391 F2d 902 (1968) and Moylan v Siciliano, 292 F2d 704 (1961). The Court in Melanson relies on Moylan, where the Court of Appeals stated at page 705,

> "And where, as here, the evidence is not newly discovered, the movant

must show that it was for some reason beyond his reach at time of trial. Talon, Inc. v. Union Slide Fastener, Inc., 9 Cir., 1959, 266 F.2d 731. In [illegible] instant case, the [illegible] new witnesses, being employees or close acquaintances of appellants were at all time readily available." (Emphasis Added).

In the case at bar, all the evidence that defendant concealed was solely in their possession, which defendant would not give to plaintiffs after repeated discovery attempts, as outlined below in detail.

In the case at bar, defendant, during the course of discovery, intentionally concealed evidence supporting a defense theory that unduly surprised and prejudiced plaintiff as outlined in detail below. This issue was before the Court in Pakech v American Export-Isbrandtsen Lines Inc, 69 FRD 534 (1976) where Judge Davis wrote at page 538-540,

"Yet, we do not find persuasive the notion that by choosing to go forward with the trial that the prejudice to the plaintiff was any of the less in its effect. Where an element of surprise exists and prejudice results, the burden should not fall on the victim who is caught unaware, but instead, the consequences must be borne by the parties who created the potential for injustice.

This, of course, follows directly from both the letter and the spirit of our Rules of Procedure and Local Rules of Court. See, F.R.Civ.P. 16 and Local Rule 7; 3 Moore's Federal Practice sec 16.11. The philosophy and purpose of pre-trial procedures was early recognized in Burton v Weyerhauser Timber Co, 1 F.R.D. 571 (D.Or.1941), a case that arose only shortly after the adoption of the Federal Rules. Therein, in awarding a new trial, sua sponte, because of the failure of counsel to disclose defenses later advanced at trial, the court declared:

> ". . . [I]t must be made clear that surprise, both as a weapon of attack and defense, is not to be tolerated under the new Federal procedure. In view of the known (and one of the primary) objectives of the New Rules of Civil Procedure, to eliminate surprise as a tactic, one can hardly imagine a greater breach of the

spirit of the New Rules . . . ." Burton, supra, 1 F.R.D. at 573.

Indeed, Burton is an ample precedent for our decision herein in light of its almost identical facts to those of the case at bar.

* * * * *

. . . . As stated by Judge Freedman in Taggart v Vermont Transportation Company, 32 F.R.D. 587, 588 (E.D. Pa.1963) aff'd 325 F.2d 1022 (3d Cir. 1964):

"The Local Rules dealing with pretrial memoranda seek to clarify the issues and reduce the element of surprise . . . . These Rules, which require the most complete disclosure on both sides, must not be permitted to degenerate in practice into traps for the unwary. Compliance with their provisions should be candid and complete. Council will not be required to read his adversary's pretrial memorandum in search for what it may conceal." (Emphasis supplied) 32 F.R.D. at 588.

* * * * *

Furthermore, it is argued, plaintiff's counsel himself failed

in certain respects to timely object to defendant's proof or to move for a continuance or mistrial, or otherwise to take steps to prevent possible harm.

> [6,7] We do not, as noted before, find the latter point appealing. While it must be recognized that a party claiming unfair surprise must be duly diligent in attempting to avoid potential prejudice, we find no fault with plaintiff's counsel here. Cf. 6A Moore's Federal Practice sec 59.08[2] at p. 59-111.
>
> * * * * *
>
> The defendants here violated what must be seen as fundamental precepts of our pre-trial procedures in a manner that was inconsistent with the interest of justice. It is regretful that, by doing so, they demonstrated either an imprudent lack of preparation or a lack of fidelity to opposing counsel and to this Court, both of which, in terms of trial advocacy, are unacceptable attributes."
> (Emphasis Added)

In the case at bar, plaintiffs objected to the introduction of the evidence. By upholding the Trial Court's ruling, which

was affirmed by the U.S. Court of Appeals, Sixth Circuit, would only condone Defendant's prejudicial misconduct as outlined below.

(B) DEFENDANT'S PREJUDICIAL MISCONDUCT

1. The defendant, during the course of discovery, intentionally concealed evidence supporting a defense theory that unduly surprised and prejudiced plaintiff. The revelation came during defense counsel's opening statement (Tr 35), and was buttressed during the testimony of defendant's expert, Bruce Adams, who read from Corning catalogs, over plaintiff's objection, which catalogs purport to put the year of manufacture of carafe model 8008 at 1971. (Tr 500, 501)

(a) Defendant, prior to trial, failed to accurately disclose the last date of manufacture of the specific style of carafe involved in the instant case. On the contrary, the defendant represented to

plaintiff that the exact carafe in question was being shipped for sale up to 1978. For example, see Defendant's Supplemental Answers to Plaintiffs' Interrogatories (first set of interrogatories) which states in part,

"1. . . . In the remainder of these additional responses, where reference is made to the "carafe", unless the context indicates otherwise, the response refers to a Catalogue No. 8008 Pyrex coffee carafe. (Emphasis added)

2. The number of carafes manufactured per year varied. Shipment figures, which may differ on a yearly basis from manufacturing figures, indicate that the following numbers of carafes were shipped between 1970 and 1978:

1970	115M
1971	151
1972	142
1973	107
1974	132
1975	75
1976	47
1977	50
1978	35
	855M TOTAL"

See also Defendant's Answer to Plaintiffs' Request for Admissions dated April 23, 1981, which states in part,

"1. In answering Plaintiffs' request for admission #1, Defendant admits that the

> coffee carafe in question as furnished to the defendant and inspected by the defendant's expert in Corning, New York, which purportedly was the one involved in the accident, was a model 8008, manufactured quite some time prior to the date indicated." (Emphasis Added)

(b) Defendant's answers to interrogatories were intended to and did lead plaintiff to believe that the specific style of carafe in question had been manufactured from 1970 to 1978. (See the Supplemental Answers to Plaintiffs' Interrogatories (first set) and Defendant's Answer to Plaintiffs' Request for Admission dated April 23, 1981 quoted in part, in (a) above.)

(c) Defendant failed to identify and disclose exhibits to be used at trial, even though ordered to do so by the trial court, specifically: catalogs through which the plaintiff could have reasoned the date of manufacture of the carafe involved, and so have taken appropriate action to meet and/or verify the evidence. See Memorandum

Opinion and Order dated September 29, 1982 which states in part,

> "The latter date has since passed and therefore the Court trusts that defendant has abided by its response of August 7, 1981 and granted plaintiffs' request. If such cooperation has not yet occurred, then the Court hereby GRANTS both of plaintiffs' motions and directs the defendant to permit access to, or produce copies of, its exhibits within then days of its receipt of this Order. FR Civ P 37." (Emphasis Added.)

(d) Plaintiff had requested that the defendant produce the care and use instructions that would have accompanied the sale of the carafe in question. Plaintiff received instructions dated February, 1977, which, coupled with the cited misrepresentations, continued to mislead plaintiff into believe that the carafe in question was being manufactured and shipped for retail sale as of that point in time.

(e) The defendant intentionally concealed its claim that the carafe in question had not been purchased in August,

1979. Prior to trial, the defendant had strongly emphasized that defense of misuse and abuse, and never once referred to any mistake, fraud, or error on the plaintiffs' part in alleging a purchase date of August, 1979.

2. Defendant then asserted as a principle part of its defense at trial (Tr 35), that the last date of the manufacture of this specific style of carafe was 1971, which defense had not been raised in the pleadings nor disclosed in the pretrial statement of issues, nor ever mentioned in any exchange of discovery.

3. Plaintiff was duly diligent in preparing for trial, but had no reason to pursue discovery on the facts supporting such defenses and claims, inasmuch as such facts were concealed prior to trial contrary to court order. See Court Order dated September 29, 1981 and quoted in part on page 16 of this brief. Had plaintiff's discovery request been honestly responded to by

defendant, such facts would have become apparent to plaintiff. All evidence relating to the date of manufacture was solely within the custody and control of defendant and remained concealed prior to trial. Defendant was given ample opportunity to disclose this evidence, plaintiff having resubmitted all interrogatories in February, 1981 for supplemental responses.

4. Plaintiff was surprised by the claims raised by defendant at trial in that there had been no prior indication that defendant claimed the date of manufacture was 1971 or earlier. To the contrary, defendant had consistently identified the carafe as a Model 8008, and had given shipping quantities of the Model 8008 from 1970 through 1978. See Defendant's Supplemental Answers to plaintiffs' Interrogatories (first set) as quoted above on page 19 of this Brief. In fact, Defendant's Supplemental Answers to Plaintiff's Interrogatories, dated October 20,

1980, clearly lead one to believe that manufacturing dates and shipping dates are closely akin to one another. (See page 19 of this Brief) All defendant's answers to discovery requests were designed to conceal the last date of manufacture of the carafe from plaintiff prior to trial. A simple 1971 Catalog cover can be helpful to argue that 8008 carafes were sold in 1971, but it does not provide even a scintilla of belief that 1971 was the last year such a carafe was manufactured, especially in light of defendant's responses to discovery establishing the contrary.

5. The Plaintiffs were prejudiced by the claim of Defendant first raised at trial that the carafe was not the one purchased in August, 1979 as claimed by Plaintiffs in that:

(a) Given the distance from Plaintiffs' domicile to the Courthouse of 170 miles, Plaintiffs could not possibly during trial obtain and present

evidence to rebut defendant's claims, although had plaintiff been aware of defendant's claim, they could easily have deposed the store personnel from whom the carafe was purchased and further have deposed any number of plaintiffs' employees to prove that the newness of the carafe.

(b) One of plaintiffs' trial exhibits was a blow-up of the February, 1977 care and use instructions which were, pursuant to a request to produce, provided to plaintiff by defendant. However, they were totally irrelevant to the carafe involved if it was not manufactured after 1971. This was a very successful ploy exercised by defendant to dupe plaintiff into reliance upon documents that had no relevance to a 1971 carafe.

(c) Plaintiffs were forced to change their trial strategy and theory of the case after defendant's presentations of proofs in reference to the defense as to the age of the carafe in question. Assuming the dates of last manufacturing of the carafe in question to be 1971, then plaintiff could have attached the quality of the care and use instructions accompanying the sale of carafe in depth.

6. The conduct of defendant demonstrated an intentional design and strategy to deny plaintiffs the right to a fair trial by concealing evidence and exhibits prior to trial, and misleading plaintiff in other particulars. Such gross misconduct should not be permitted by this court and plaintiffs, at the very least, are entitled to a new trial. If the trial court's decision, which was affirmed by the United States Court of Appeals, Sixth Circuit is upheld, it will only condone defendant's misconduct.

7. Defendant had a duty, pursuant to FRCP, Rule 26(e)(2), to reasonably amend prior responses to discovery request when it obtained information upon the basis of which it knew the prior responses were incorrect or misleading, and that failure to amend was in substance an intentional concealment. Defendant breached this duty, and its

conduct is a clear violation thereof as set forth above.

Rule 59, Federal Rules of Civil Procedure, provides for a motion for a new trial for any reason for which new trials were granted prior to its enactment. (The motion is addressed to the sound judicial discretion of the trial court. Montgomery Ward v Duncan, 311 US 243, 61 S Ct 189, 85 L Ed 147 (1940).) These reasons have historically included prejudicial misconduct of the opposition.

Several federal courts have addressed the granting of a new trial on the basis of misconduct. The opinions are summarized and cited in Moore's Federal Practice.

The Trial Court is given broad discretionary authority to determine whether misconduct of a party has resulted in prejudice warranting a new trial. Moore's Federal Practice, Rule 59, p 59-102. However,

in certain instances the Court's proper exercise of discretion will require a new trial. These instances generally involve concealment of facts or evidence and surprise at trial. FRCP 60(b).

It has been held that when a party, over timely objection, is permitted to introduce a claim or defense which was not disclosed at the pretrial conference or in the pleadings, a new trial should be granted if the other party, although duly diligent, is actually surprised and prejudiced. Moore's Federal Practice, Rule 59, p 59-111, citing Commercial Credit Corp v Pepper, 187 F2d 71 (CA 5th, 1951); James v Pennsylvania R co, 35 F Supp 1017 (ED NY, 1940); and Colonial Book Co v Amsco School Publications, 48 F Supp 794 (SD NY, 1942), affirmed 142 F2d 362 (CA 2d, 1944).

It has also been held that a new trial should be granted when the moving party has been genuinely and without fault surprised

to a degree that has resulted in prejudice to this case. Norton v City Bank & Trust Co, 294 F 839 (CA 4th, 1923), Pakech v American Export-Isbrandtsen Lines Inc, 69 FRD 534 (1976)

The duty of the Court on a motion for a new trial is to be certain the verdict was not influenced by partiality or prejudice, and that there has been no miscarriage of justice. Beverino v Saydjari, 574 F2d 676 (CA NY, 1978); Hard v Stevens, 65 FRD 637 (DC PA, 1975). The discretion to be exercised by the court involves a determination of whether there has been a miscarriage of justice. If the trial court determines a miscarriage of justice has occurred from distortion, obscuration, or misconstruction of the evidence, then it is incumbent upon the judge to grant a new trial. Byce v American Honda Motor Co Inc, 59 FRD 63 (DC PA, 1971).

In the instant case, plaintiffs are

entitled to a new trial if the following facts exist:

1. Defendant was allowed to present a claim or defense at trial which had not been disclosed prior to trial;

2. Plaintiff was duly diligent in preparing for trial;

3. Plaintiff was surprised by the claim or defense presented at trial; and

4. Plaintiff was prejudiced.

One and two above easily discernable from the discovery pleadings, defendant's answer to plaintiffs' complaint and affirmative defenses. Three is apparent from the trial strategy and exhibits selected for use by plaintiff, e.g., 1977 care and use instruction blow-ups that, apparently, did not apply to the carafe in question. Four is for the Court's decision on the basis of the other three.

The docket sheet of the District Court shows that plaintiffs' counsel engaged in extensive pretrial discovery. Depositions

were taken, interrogatories were filed, documents were sought, and requests to admit submitted. Plaintiffs' counsel diligently sought disclosure of material facts and exhibits prior to trial. Defendant's reluctance to make disclosure is readily apparent from the multiple motions brought by plaintiff to force the disclosure of relevant discovery from the control of defendant.

Pursuant to discovery requests and motions, the trial court entered an order requiring defendant to produce copies of, or permit plaintiffs access to, all its exhibits within ten (10) days of receipt of the order. (Memorandum Order and Opinion dated September 29, 1981, quoted in part on page 21 of this Brief). The same order also required the parties to submit a Supplemental Joint Pretrial Statement by October 28, 1981, disclosing witnesses, exhibits, a statement of claims or defenses, and issues of law or fact to be resolved.

Defendant would not timely provide plaintiff with its input to the pretrial statement, therefore, in order to timely file the requested pretrial information, plaintiff had to file the information without the defendant's input. Defendant thereafter filed its input and plaintiff moved the Court for an order striking defendant's pleadings or exhibits for refusing to allow plaintiff to see defendant's exhibits. Motion to Strike Defendant's Pleadings Or, In the Alternative, To Strike All Of Defendant's Listed Exhibits, dated October 14, 1981. The motion was denied as untimely. (Memorandum Opinion and Order, dated November 9, 1981) However, as the foregoing Motion To Strike Defendant's Pleadings Or, In The Alternative, To Strike All Of Defendant's Listed Exhibits, dated October 14, 1981, shows, plaintiff had been attempting to discover these exhibits for months, but defendant refused to disclose them.

Defendant's input to the pretrial statement listed the following exhibits:

> "(4) Photographs and/or portions of the catalog identifying the carafe in question to establish its time of manufacture and appearance when new." (Emphasis Added)

At trial, defendant, over objection offered four catalogs to compare the various carafes and show the carafe in this case had been last manufactured in 1971. (Tr 502) Had this information been disclosed prior to trial, plaintiffs could easily have identified the carafe in question, and reasoned the time frame of its distribution for retail sale. Plaintiff did not see the catalogs prior to their being marked as defense exhibits at trial, although the order of this Court clearly directed they be disclosed within ten days after receipt of the September 29, 1981 Order, supra.

During discovery, plaintiffs requested that defendant identify the carafe

in question, Requests to Admit, dated April 23, 1981. Defendant's answer to this request admits the carafe is the product, and identify it as a Model 8008. (Answer to Plaintiff's Request for Admissions, dated May 12, 1981) Answers to Interrogatories provide figures for the number of 8008 carafe shipped each year from 1970 to 1978. (Defendant's Supplemental Answers to Plaintiff's Interrogatories, dated October 20, 1980) (See page 19 of this Brief) Throughout the discovery period, defendant consistently identified the carafe as a Model 8008 beverage server and led plaintiffs to believe it had been manufactured up to 1978. At no time did defendant raise any issue or defense related to the manufacturing date. The four catalogs demonstrate that after 1971, the 8008 series appeared with different design markings from the style of plaintiffs' carafe. Defendant knew that the different design features of the carafe changed its catalog number clearly, since that feature was

the criteria supporting the defense. According to the catalogs, the post-1971 carafe carried additional numbers following the 8008. There was only one style catalog numbered 8008 which was plaintiffs'. The different numbers after the 8008, with reference to the post-1971 carafes, make it clear that the defendant's response to plaintiffs' interrogatories and request to produce were intentionally false and misleading. Defendant had a duty to correct any responses to interrogatories, if such would intend to mislead plaintiff. FRCP, Rule 26(e)(2). This is a classic case of a violation of that rule.

Again, it was only in defendant's opening statement at trial that plaintiffs first learned of defendant's claim that this particular style of design was last made in 1971. At the time, defense counsel asserted the following:

> "'. . . .We suspect that the product was the other one, not the one they bought in August, the one that didn't break. We suspect that this product had been misused for several years to the point where it finally developed a crack and it broke." (Tr 35) (Emphasis Added)

Defendant's pretrial statements of the defenses or issues of fact to be litigated do not raise this issue in any manner or give plaintiffs any notice of this defense.

Plaintiffs were clearly prejudiced by the tactics of defendant. There was no opportunity to obtain or present evidence to rebut the new claims of the defendant. Plaintiffs were surprised to learn, for the first time, defendant's claim that the carafe had been misused and abused for many years and had not been manufactured after 1971. Plaintiffs had no opportunity to seek evidence from defendant's manufacturing records to impeach this claim. Nor did they have an opportunity to seek rebuttal witnesses who could establish a date of purchase.

Due to the untimely disclosure made by defendant, plaintiffs were forced to change their theory and strategy on a moments notice. The exhibits prepared by plaintiffs involving care and use instructions were taken from the 1977 instructions provided to plaintiffs in response to Interrogatories to Defendant, dated March 6, 1981, seeking care and use instructions supplied with the carafe in the instant case. Those instructions were clearly not applicable to an 8008 server last claimed to be manufactured in 1971.

The defendant's acts in concealing claims and defenses, as well as exhibits which would reveal the defenses, were clearly in violation of the general purposes of the discovery rules. Plaintiffs, although duly diligent, could not possibly have discovered this claim of defendant without examining evidence in the exclusive possession of the defendant in its pretrial statement.

Defendant did not even claim as a fact question to be litigated that the carafe was not purchased in August of 1971. Plaintiffs' Motion for New Trial should have been granted. The U.S. Court of Appeals, Sixth Circuit erred when it affirmed the judgment against Plaintiff.

BEST AVAILABLE COPY

CONCLUSION

Bound as we all are by the record in his case, it seems reasonable to conclude that the relief requested by plaintiffs should be granted, any other decision would only condone defendant's prejudicial misconduct.

RELIEF SOUGHT

WHEREFORE, for all the reasons stated, plaintiffs respectfully request that this Court reverse the verdict of no cause for action and remand for a new trial.

RESPECTFULLY SUBMITTED,

JERRY L. SUMPTER, J.D.(P21164)
Attorney for Petitioner
P. O. Box 286
Cheboygan, Michigan 49721-0286
Phone: (616) 627-7167
Dated: December 2, 1985

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF CHEBOYGAN)

Jerry L. Sumpter, being first duly sworn deposes and says that on December 2, 1985 he deposited 40 copies of the foregoing Petition for Writ of Certiorari, and Appendix to the U.S. Supreme Court Clerk, Washington, D.C. 20543 and one copy of same to:

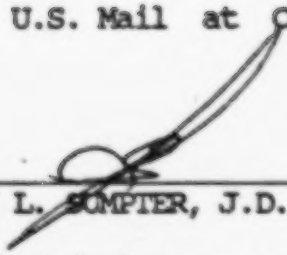
Jeffrey H. Beusse, Attorney for Respondent
Sixth Floor, Frey Building
Grand Rapids, Michigan 49503

U.S. Court of Appeals - Sixth Circuit
U.S. Post Office & Courthouse Bldg
Cincinnati, Ohio 45202

U.S. District Court - Eastern District, Mich.
Northern Division
Federal Building
Bay City, Michigan 48707

by enclosing same in properly addressed envelopes with postage fully paid thereon and

depositing in the U.S. Mail at Cheboygan, Michigan.



JERRY L. SUMPTER, J.D. (P21164)

SUBSCRIBED AND SWORN TO before me on December 2, 1985.

Judy M Arnold

Judy M. Arnold, Notary Public
Cheboygan County, Michigan
My Com. Ex: 3/20/88

Case No. 83-1814

UNITED STATES SUPREME COURT

October, 1985 Term

CHARLES FREESE, Next Friend for HEIDI FREESE and Individually, and RENATE FREESE, Jointly and Severally,

Petitioners for Writ of Certiorari

vs.

CORNING GLASS WORKS, a New York Corporation,

Respondent

On Appeal from the United States District Court-Eastern District of Michigan; On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CHARLES FREESE, Next Friend for HEIDI FREESE and Individually, and RENATE FREESE, Jointly and Severally,

Plaintiffs,

v

CIVIL ACTION
NO: 80-10041

CORNING GLASS WORKS,

Defendant,

_____/

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable James Harvey, United States District Judge, presiding, and the issues having been tried and the jury having rendered its answers to special interrogatories;

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing and the action be dismissed against the defendant Corning Glass Works.

APPENDIX 1: Judgment of trial court

Dated this 30th day of December, 1982 in Bay City, Michigan.

ROBERT A. MOSSING, CLERK

/s/_____
By: Kim A. Foster,
Deputy Clerk

Approved as to form pursuant to FR Civ. P 58

/s/_____
JAMES HARVEY
United States District Judge

APPENDIX 1: Judgment of trial court

No. 83-1814

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES AND RENATE FREESE,	:
	:
Plaintiffs-Appellants	:ORDER
	:
VS	:
	:
CORNING GLASS WORKS,	:
	:
Defendant-Appellee	:

BEFORE: LIVELY, Chief Circuit Judge, MERRITT and CONTIE, Circuit Judges

This cause having come on to be heard upon the record, the briefs and oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be, and it hereby is, affirmed.

APPENDIX 2: Order of Court of Appeals

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/_____

Filed: July 17, 1985

APPENDIX 2: Order of Court of Appeals

NO. 83-1814

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES FREESE, ETC., ET AL	:	
	:	
Plaintiffs-Appellants,	:	ORDER
	:	
vs	:	
	:	
CORNING GLASS WORKS, A NEW YORK CORPORATION,	:	
	:	
	:	
Defendant-Appellee	:	

BEFORE: LIVELY, Chief Judge, MERRITT and CONTIE, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

APPENDIX 3: Order denying hearing en banc

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
John P.Hehman, Clerk

Filed: August 28, 1985

APPENDIX 3: Order dening rehearing en banc

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-992

In The
Supreme Court of the United States
October Term, 1985

CHARLES FREESE, Next Friend for HEIDI FREESE and Individually, and RENATE FREESE, Jointly and Severally,

Petitioners for Writ of Certiorari,

vs.

CORNING GLASS WORKS, a New York Corporation,

Respondent.

On Appeal from the United States District Court— Eastern District of Michigan; On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Submitted by:

BUCHANAN & BOS
JEFFREY H. BEUSSE (P-29869)

Sixth Floor Frey Building
Grand Rapids, Michigan 49503
Telephone: (616) 458-1224

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. IS THERE ANY SPECIAL AND IMPORTANT REASON FOR THE SUPREME COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17?

Respondent says	"No"
Petitioner says	"Yes"
Trial Court would answer	"No"
U.S. Sixth Circuit Court would answer	"No"

II. SHOULD THE RULE OF LAW BE PRESERVED THAT REQUIRES A PARTY CLAIMING SURPRISE TO ACT DILIGENTLY IN SEEKING RELIEF AND THAT LEAVES TO THE DISCRETION OF THE TRIAL COURT THE DETERMINATION OF WHETHER SURPRISE OR DILIGENCE EXISTS AND, IF SO, THE APPROPRIATE REMEDY?

Respondent says	"Yes"
Petitioner says	"No"
Trial Court says	"Yes"
U.S. Sixth Circuit Court says	"Yes"

LIST OF PARTIES

CORNING GLASS WORKS

LIST OF AFFILIATIONS

Corning Europe, Inc. (Paris, Avon)
Corning Enterprises Inc.
Borosil Glass Works, Ltd.
Corning Glass Foreign Sales Corporation
Watkins Glen International, Inc.
Wine Market, Inc.
Corning Hotel Corp.
Elmirn Aeronautical Corporation
Chemung Aviation Inc.
Horseheads Aeronautical Corp.
Components Incorporated
Corning Glass Int'l. Sales Corp.
COR LA/AF
Corning Japan Incorporated (Tokyo)
MetPath Inc.
HealthFirst Corp.
MetPath Information Services, Inc.
Stat Toxicology
Service of Boston Inc.
Statpath, Inc.
MetPath Laboratory Corporation
Personal Services Inc.
International Medical Services Inc.
MetPath Europe Limited
MetPath (U.K.) Ltd.
MetPath (Schweiz) A.G.
Laboratoire Riotton S.A.
Enzym - Labor
Dr. H. Weber A.G.
Health Profile Services Inc.
CBT Laboratories Inc.
New England Medical Laboratories Inc.
New England Medical Laboratories, Inc.
Connecticut Region, Inc.
Clinpath Lab Inc.
Arizona Laboratory Corporation

Australian Crown Crystal Inc.
K.C. Biological, Inc.
K.C. Int'l. Inc.
Genencor Inc.
Chr. Hanson Laboratorium S/A
Genetech, Inc.
Siecor Corporation
Superior Group, Inc.
Superior Cable Int'l. Corp.
Pittsburgh Corning Corporation
Dow Corning Corporation
Owens-Corning Fiberglas Corporation
Scientific Micro Systems, Inc.
Oximetrix, Inc.
Nutrisearch Co.
Doan Associates
PlessCor Optronics, Inc.
Steuben Partners, L.P.
Fairfield Venture Partners II, L.P.
Advent Techno-Venture Investment Corp.
Gilford Instrument Laboratories, Inc.
Gilford Instrument Int'l. Inc.
Ciba Corning Diagnostics Corporation
Ciba Corning Diagnostics Foreign Sales Corp.
Ciba Corning Diagnostics International Corp.
Ciba Corning Diagnostics GmbH
(Formerly Corning Medical GmbH)
Ciba Corning Diagnostics KK
(Formerly Corning Medical KK)
Ciba Corning Diagnostics Limited
Ciba Corning Diagnostics (HK) Limited
Ciba Corning Diagnostics, S.A.
(Future French Company)
Corning International Corp.
Corning France, S.A.
Sicover, S.A.
Societe E.I.V.S. S.A.
Corning S.p.A.
N.V. Corning Benelux, S.A.
Corning Iberica, S.A.

Corvire SARL
Sovcor, S.A.
CGISA (Panama)
Corning Venezolana, S.A.
CISSA (Manila, Seoul, Singapore)
Pacific Int'l. Corp.
Corning (H.K.) Limited
Glass Technologists PTE Ltd.
Pacific Glass Corp.
Corning Nederland BV (In Liquidation)
Crown Corning Ltd.
J.A. Jobling & Co. Pty. Ltd.
Corning Finance A.G.
Gilford Europe S.A.
Corning Limited
Corning (Holdings) Ltd.
Corning A.B.
Joquimica, S.A.
Malkin Ltd.
Acecrest Ltd.
Villabrook Ltd.
Corning Biosystems Ltd.
Specialist Dairy Ingredients
Samsung-Corning Co. Ltd.
Iwaki Glass Co., Ltd.
Iwaki Housewares Company
Radelcor Inst. Sales, Ltd.
Corning (Singapore) PTE Ltd.
Teddington Co., Ltd.
Rigolleau S.A.
Vitrofar S.A.
Cristamine S.A.
Vidplan S.A.
Corning KK
N-Cor Ltd.
TECOM
Universal Scientific Industrial Co., Ltd.
Corning Mexicans, S.A. de C.V.
Productos Cng. de Mexico, S.A. de C.V.
Vitrocrisa Kristal, S.A.

Corning GmbH
Draloric GmbH (In Liquidation)
QVF Glastechnik GmbH
Corning Keramik GmbH
Corning Keramik GmbH & Co. KG
Siecor GmbH (Not Finalized)
Siecor GmbH & Co. KG
Corning Investments Inc.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning Scandinavia AB
Deutache Pittsburgh Corning GmbH
Pittsburgh Corning (U.K.) Ltd.
Pittsburgh Corning Nederland B.V.
Pittsburgh Corning France SARL
Pittsburgh Corning GmbH
Pittsburgh Corning (Schweiz) A.G.
Corning Brasil - Vidros Especiais Ltds.
Fibres Optiques Industries S.A.
Corning Canada, Inc.
Optical Fibres
Optical Waveguides Australia Pty. Limited

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	vi
Index of Authorities	vii
Opinions and Judgments Delivered Below	1
Jurisdiction	1
Statutes and Constitutional Provisions Involved	1
Statement of Facts	1
Reasons Why Writ Should be Denied	6
I. THERE IS NO SPECIAL AND IMPORTANT REASON FOR THE SUPREME COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17	6
II. THE RULE OF LAW SHOULD BE PRESERVED THAT REQUIRES A PARTY CLAIMING SURPRISE TO ACT DILIGENTLY IN SEEKING RELIEF AND LEAVES THE DETERMINATION AS TO THE EXISTENCE OF SURPRISE OR DILIGENCE OF THE PARTY TO THE DISCRETION OF THE TRIAL COURT	8
Conclusion	17
Relief Requested	18

INDEX OF AUTHORITIES

Cases	Page
Aetna Casualty and Surety Co v Yates, 112 F2d 350 (4th Cir 1941)	9
Campbell v American Foreign SS Corp, 116 F2d 926 (2nd Cir 1941); cert denied, 313 US 572, 85 L Ed 1530, 61 S Ct 1959	9
Cathedral Estates v Taft Realty Corp, 2 Cir, 1955 228 F2d 85	15
Creedon v Loring, 1 Cir, 1957 249 F2d 714	15
Curtis Publishing Company v Butts, 351 F2d 702, 714 (5th Cir 1965)	16
Exxon Corp v Exxene Corp, 696 F2d 544 (7th Cir 1982)	15
Freid v McGraff, 76 App DC 388, 133 F2d 350 (1942)	9
Melanson Company v Hupp Corporation, 391 F2d 902 (3rd Cir 1969)	14
Moylan v Siciliano, 292 F2d 704, 705 (9th Cir 1961)	14
Paris v Chanclor, 537 F2d 203 (5th Cir 1976)	10
Rasmussen Drilling, Inc, v Kerr-McGee Nuclear Corp, 571 F2d 1144 (8th Cir 1978), Cert denied, 439 US 862, 99 S Ct 183, 78 L Ed 2d 171	9
Spurlin v General Motors Corp, 528 F2d 612 (5th Cir 1976)	9

Court Rules	
Supreme Court Rule 17.1	6
Sixth Circuit Rule 24	7, 8
F.R. Civ. P. 61 391 F2d 903	14

Index of Authorities (Cont'd)

PAGE

MISCELLANEOUS

Memorandum Opinion and Order, P. 2 17

Moore Federal Practice, Paragraph 59.08 [2] at 59-111 (2nd Ed 1982) 15

Petitioner's Appendix 2 7

OPINIONS AND JUDGMENTS DELIVERED BELOW

The opinions and judgments are adequately set forth in the petition.

JURISDICTION

The statement of jurisdiction is adequately set forth in the petition.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

There are none.

STATEMENT OF FACTS

This is a products liability case arising from injuries sustained by Heidi Freese, a minor, when a glass carafe she was carrying suddenly broke at the bottom, causing hot water to spill on and scald her right thigh.

Petitioners complain that they were surprised during respondent's opening statement at trial when respondent's counsel advised the jury that the carafe in question was not manufactured after 1971, then suggested that the carafe that broke was not the one recently purchased by the Freeses in approximately 1979, but rather a much older one manufactured prior to 1971. Specifically, respondent's counsel stated:

> Interestingly enough, the last time they made that particular style of design was in 1971. Now, that was an interesting fact. The last time it was made in 1971. I don't know, and we don't know, how the facts are going to explain that in August of 1979, they went to the store and bought that product off the shelf as a brand new product. Where was it from "71" to "79"? The last time we made it was in "71". (TR, 35)

Respondent's counsel then observed that the Freeses possessed two coffee carafes, the one that they had owned for a long time and a newly purchased one to replace another old one. Counsel advised that the jury would have a right to question how the buildup of lime deposits and scratches found by petitioners' expert could have occurred so quickly after purchase, and suggested that the real fact of the matter in this case was that Heidi Freese was carrying the older of the two carafes which has been misused by numerous people over a lengthy period of time.

Petitioners' counsel did not object to respondent counsel's opening statement, did not seek a continuance, and did not move for mistrial. He elected to permit the jury to continue to hear the evidence.

The evidence that the jury heard from respondent during the course of trial was that the carafe in question was made in 1971 and the first few months in 1972 (TR, 612, 679), that the latest it could have been in control of the carafe would have been 1973 (TR, 670), and this carafe had been gouged, struck and abused so severely that a crack had been created as a result thereof, and that it had been heated improperly. (TR, 511-518, 672) The jury also heard Mrs. Freese state that she knew how to care for the pot and did not use abrasives or otherwise wash or treat

it improperly. She stated that she didn't need to be told how to care for the pot, because she knew how, and that she was aware that if pots are scratched they can break. (TR, 422-425)

The pretrial pleadings do not support petitioners' claim that respondent's counsel concealed facts or theories of the case during discovery or otherwise engaged in misconduct. Paragraph 4 of petitioners' Complaint alleges that "some time prior to 1979, defendant placed into the stream of commerce, a Pyrex coffee carafe." The identical allegation is contained in petitioners' Amended Complaint filed over a year after the original. Petitioners' counsel obviously did not consider the specific date of manufacture important.

In Interrogatory 2, dated December 9, 1980, petitioners inquired how many carafes were manufactured per year. Respondent refused to answer on grounds that there was insufficient identification of the product and because petitioners would not permit respondent to inspect the product. The court determined that respondent should answer on the basis of a photograph provided by petitioners, noting that the respondent had not properly requested production of the carafe. Subsequently, respondent answered Interrogatory 2 as follows:

> The number of carafes manufactured per year varied. Shipment figures, which may differ on a yearly basis from manufacturing figures, indicate that the following numbers of carafes were shipped between 1970 and 1978 [Figures Omitted]

Petitioners' Interrogatory did not ask for the specific date of manufacture and never offered respondent more specific information to enable defendant to be precise

about the identity (make and model) of the carafe, even though petitioners were well aware that respondent believed it needed the information in order to answer properly. Additionally, petitioners did not follow respondent's Answer to Interrogatory 2 with a more precise interrogatary about the year of manufacture.

This lack of concern on petitioners' part for specific information about the year of manufacture of the carafe is evident in other documents prepared by petitioners. For example, in Interrogatories dated February 25, 1981, petitioners asked in Interrogatory 1: "Does, or has, the defendant within the past five years, manufactured any glass carafes for commercial use?" Petitioners also asked for information in Interrogatories dated March 6, 1981, for warnings, admonitions, or cautionary instructions transmitted to the purchasers of the "type of carafe referred to in plaintiffs' Complaint." Petitioners used the same general language in the Request for Produce filed the same date. However, petitioners' Complaint does not specify a type of carafe.

Additionally, petitioners filed Requests to Admit dated April 23, 1981, demanding that respondent admit that the carafe was manufactured prior to August 1979, and admit that the same was sold to the Freeses in August 1979. *Defendant admitted the manufacture was prior to 1979 and denied knowledge of the date of sale to the Freeses.* As the Court of Appeals noted during oral argument, if what the petitioners wanted was the date of manufacture, they never asked for the date, despite filing 17 sets of interrogatories, seven requests to produce, six motions to produce, and four requests to admit.

The opening statement by petitioners' counsel at trial focused on the theory of respondent's liability for failure to warn that the use of an abrasive in cleaning the glass carafe could cause scratches which would result in weakening of the carafe, thereby making it dangerous:

> The simplicity in this case is that whoever put that scratch in that carafe had no way of knowing that they should not use anything on the interior of the carafe that would put this scratch in there. (TR, 22)
>
> * * *
>
> So what happened in this case, and why we are here, the entire guts of the case is that they didn't give us any warning at all. Zero. (TR, 24)

Petitioners' counsel knew very well that the date of manufacture would be vital under his duty to warn theory, as is evidenced by his comments to the jury during opening statement:

> Now, the theory by which we are claiming plaintiff is entitled to prevail is one of what we call implied warranty, and one what we will call negligence, and perhaps there will be some discussion on express warranty. An implied warranty means that the product has got to be sold when leaves the manufacturer so that it's not defective or not reasonably safe. Your job in this case will be to determine whether or not when this product left it was unreasonably safe, because it did not have the proper warnings associated with its use. (TR, 27)

In fact most of the presentation of proofs at trial centered on the failure to warn theory, just as petitioners' counsel predicted to the jury. Contrary to their claim, petitioners' trial strategy was not changed at all.

As observed by the Court of Appeals during oral argument, any surprise sustained by petitioners did not occur

because of concealment by respondent but rather from inartful drafting of interrogatory questions by petitioners' counsel which were answered by respondent. The Court of Appeals also observed that the record did not support petitioners' claim of surprise since they failed to object to respondent counsel's opening statement, failed to seek a continuance, and did not move for mistrial. In rendering an opinion from the bench, the Court of Appeals found that respondent did not engage in misconduct, that petitioners failed to preserve any rights they had at trial, and that petitioners had ample opportunity during the course of a long weekend to return home to obtain whatever rebuttal testimony they needed, and the trial court did not abuse its discretion in denying petitioners' Motion for New Trial.

———o———

REASONS WHY WRIT SHOULD BE DENIED

I. THERE IS NO SPECIAL AND IMPORTANT REASON FOR THE SUPREME COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17

Supreme Court Rule 17.1 reads as follows:

A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; or has denied a Federal question in a way to conflict with the

> state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> (b) When a state court of last resort has decided a Federal question in a way in conflict with the decision of another state court of last resort or the Federal Court of Appeals.
>
> (c) When a state court or a Federal Court of Appeals has decided an important issue of federal law which has not been, but should be, settled by this court, or has decided a Federal question in a way in conflict with applicable decisions of this court.

Petitioner fails to come within any of the criteria set forth in said Rule.

First, petitioner does not allege that the Court of Appeals has rendered a decision in conflict with another Federal Court of Appeals on the matters involved herein. This is wise, inasmuch as the issue before the Sixth Circuit Court of Appeals in this case was merely one of applying traditional law applicable in every state and circuit court holding with respect to a duty to protect one's own interest by timely objecting, moving for continuance, or moving for mistrial, and the trial court's discretion to rule on the same.

The relative unimportance of this case is further underscored by the Court of Appeals own limitation to not recommend its opinion for full text publication but rather to deliver its opinion from the bench following oral argument. (Petitioner's Appendix 2). Unpublished opinions in the Sixth Circuit fall under Rule 24 of the Sixth Circuit which provides in relevant part:

> (b) Citation of unpublished decisions. Citation of unpublished decisions by counsel in Briefs and oral arguments in this court and in the District Courts within this court is disfavored, except for the purpose of establishing res judicata, estoppel, or law of the case.

The consequence of Rule 24 is that the unpublished opinions, such as the one involved herein, can have virtually no effect on the development of law. Unpublished opinions therefore lack the incidental but significant effect of precedent accorded published opinions and instead are necessarily opinions limited to the narrow function of addressing and determining the rights and liabilities of the parties immediately involved therein.

In short, we sbumit that this Court reserve its limited resources for review of cases raising germane and genuine issues of law involving questions of substantial magnitude in contrast to petitioners' request for Writ of Certiorari whose genesis lies in petitioners' complaints which were fully considered by the trial court and affirmed by the Sixth Circuit Court of Appeals.

II. THE RULE OF LAW SHOULD BE PRESERVED THAT REQUIRES A PARTY CLAIMING SURPRISE TO ACT DILIGENTLY IN SEEKING RELIEF AND LEAVES THE DETERMINATION AS TO THE EXISTENCE OF SURPRISE OR DILIGENCE OF THE PARTY TO THE DISCRETION OF THE TRIAL COURT

The logic of petitioners' request for relief is indeed puzzling. They seek abrogation of the rule that in order to obtain a continuance during trial for a ruling of mistrial, they need not request the continuance or move for

mistrial. It appears that petitioners would have the Supreme Court innovate a rule requiring the trial judge to read their minds and thus relieve them of the well-recognized responsibility of being reasonably alert to safe guard their own interests. Since even petitioners cannot be so illogical, we can only presume that the real purpose for framing their request for relief as they have is to elevate to constitutional proportions the very simple question of whether a complete review of the record reveals that grounds exist to grant petitioners a new trial in this cause. Both the trial court and the Sixth Circuit Court of Appeals have conducted such a review and found that plaintiffs' allegations lack merit.

It is a well-settled rule that the granting or refusing of a new trial rests within the discretion of the trial court and will be reviewed only for a clear abuse of discretion. *Spurlin v General Motors Corp,* 528 F2d 612 (5th Cir 1976); *Campbell v American Foreign SS Corp,* 116 F2d 926 (2nd Cir 1941); Cert denied, 313 US 573, 85 L Ed 1530, 61 S Ct 1959; *Aetna Casualty and Surety Co v Yates,* 112 F2d 350 (4th Cir 1941). As a matter of law and practicality, the conduct of the trial and the pretrial proceedings, including rules on motions and objections, is vested in the sound discretion of the trial court and will not be disturbed on review unless it affirmatively appears from the record that the trial court abused its discretion. *Rasmuessen Drilling, Inc v Kerr-McGee Nuclear Corp,* 571 F2d 1144 (8th Cir 1978), Cert denied, 439 US 862, 99 S Ct 183, 78 L Ed 2d 171. Even so, it is also well settled that the determination of a jury should not be set aside in granting a new trial, except in unsual circumstances. *Freid v McGraff,* 76 App DC 388, 133 F2d 350 (1942). For that rea-

son, when a trial judge denies a motion for new trial and thereby leaves the jury's determination intact, all factors underlying appellate review of the ruling press in favor of leaving the verdict undisturbed. *Paris v Chanclor,* 537 F2d 203 (5th Cir 1976).

The petitioners recite a miscellany of items they categorize as acts of misconduct on the part of respondent that intentionally deceived petitioners and caused them to be surprised and unprepared at trial. Respondent denies that these items constitute misconduct or an intent to deceive petitioners, and further denies that petitioners were surprised at trial. Indeed, petitioners make a number of references to being surprised but fail to indicate specifically the nature of the surprise or how it allegedly caused them to completely change their trial strategy; in fact, petitioners fail to even apprise the Supreme Court of what their strategy was, or what it was changed to. We submit that even a cursory inspection of the record indicates that the case was tried exactly as petitioners planned, that is, as a failure to warn case. However, even if petitioners were surprised at trial, the record and the opinions of the courts below make it clear that any surprise was the result of petitioners' neglect to concern themselves with the manufacturing date of the particular carafe.

In answer to petitioners' allegations of misconduct and intent to deceive, we refer this court to the pretrial pleadings set forth in the counter-statement of facts herein. These pleadings reveal that petitioners persisted in asking about the last day of the manufacture of the specific style of the carafe without first giving the respondent the opportunity to inspect the broken carafe. Indeed, respondent did not have the opportunity to inspect the carafe

for over one year after making the request, and when the opportunity did occur, it occurred two months prior to the date trial in this cause of action was initially scheduled to commence. Without inspecting the carafe, respondent could not positively state that it had manufactured the carafe, that the carafe was a specific size or model, and that the carafe was manufactured at a specific time. However, in response to the trial court's order that respondent should answer the petitioners' interrogatory, after viewing a photograph of the carafe, respondent did narrow the model of the carafe to a 8008. These problems of identification were reiterated during the trial testimony of Bruce Adams of respondent Corporation. (TR, 499-500)

With respect to the date of manufacture of the carafe, we would again point out that petitioners were never sufficiently concerned with that date to make a specific inquiry of respondent. Petitioners were primarily concerned with establishing only that the carafe was manufactured prior to the alleged date of purchase in 1979. Petitioners are incorrect in claiming that respondent was under an obligation to reveal the date of manufacture of the exact model and type of the carafe when petitioners never asked specifically for the information and refused to permit respondent the opportunity to inspect the actual carafe in question until after the cessation of discovery.

Because of these same facts and conditions, it cannot be said that respondent truly hid from petitioners its theory of defense until opening statement of trial. Until it obtained inspection of the carafe, respondent did not have any means of ascertaining the age of the carafe or the condition of the interior of the carafe with respect to

cracks caused by scouring and striking of objects, as well as the buildup of lime deposits. Moreover, these factors regarding the condition and age of the carafe would have been issues during trial regardless of the issue of petitioners having two carafes and being mistaken about which one was replaced by a new carafe. The proof of petitioners' claim was theirs to shoulder; it was not respondent's responsibility as if it were an affirmative defense. Petitioners cannot now attempt to claim that the date of manufacture was an affirmative defense which respondent was required to reveal, but instead concealed.

Petitioners' also claim that respondent failed to identify and disclose as an exhibit the catalog referred to in petitioners' brief. In response, we would simply observe that respondent named the catalogs as exhibits in the final pretrial order, and note that on the first day of trial, the trial court observed that both parties failed to comply with its order regarding disclosing exhibits, then stated:

> THE COURT: Yes. And the Court will say, gentlemen, that I might as well tell you right now, the Court is going through today as we have with regard to the exhibits, but the Court will say the counsel have not complied with—counsel on either side—the Court's Pre-trial Order. The Court is going to require that counsel bring into Court on Tuesday morning—although I have had the jury come back here at quarter till one, I want counsel here at least by 10 o'clock in the morning—and bring with them all exhibits to be presented in the case. The court reporter will be here and will mark those exhibits at that time, and the Court will direct that counsel exchange those exhibits with opposing counsel.
>
> Then, the Court would like opposing counsel on each case to take a sheet of paper and indicate in writing

> what objections, if any, there are to the respective exhibits which are intended to be offered. The Court requires this to be done in its Pre-Trial Order, and it has not been done. The Court believes that we'll greatly expedite the trial if the Court knows in advance which exhibits are going to be offered, and know that counsel has had an opportunity to examine them and knows in advance what objections are going to be made to those exhibits. (TR, 12-13)

It is clear that petitioners had access to the exhibit in advance of trial and that petitioners were not so blameless as they claim in their Petition to the Supreme Court. It is also clear, that by failing to request a continuance, the petitioners did not "reason" the date of manufacture of the carafe involved or attempt to take appropriate action to meet and/or verify the evidence, as they claim they would have, in their Petition. Moreover, the failure by petitioners to object, to move the court for a mistrial or a continuance, or to seek any other form of remedial relief, during or after respondent counsel's opening statement suggests that petitioners were not really concerned at that time with the date of manufacture.

Finally, insofar as petitioners' claim that respondent misled it by submitting the 1977 instructions, we would note that petitioners wanted the material in connection with the duty to warn theory, and that there was no difference in the 1971 and 1977 domestic carafes or their instructions with respect to that issue; in other words, the domestic carafes had no warnings printed on them, and the directions contained the same instructions with regard to care and cleaning. Petitioners have failed to show how submitting the 1977 instructions was deliberate, misleading, or prejudicial.

A number of courts have considered requests for new trial on grounds similar to the ones here. The following opinion of the court in *Melanson Company v Hupp Corporation*, 391 F2d 902 (3rd Cir 1968), is self-explanatory:

> This action for damages from breach of warranty and negligence due to an allegedly defective marine diesel engine sold to appellant is before the Court on appeal from a judgment for the defendant-appellees following a five week trial to the court. After consideration of the record, we find substantial evidence to support the district court opinion and judgment, including the finding of the trial judge that the damage to the engine did not result from the alleged defect in having cylinder liner sleeves a fraction of one hundredth of an inch below the engine block. *Also, since appellant concedes that it knew by the second day of the five week trial of appellee's contention that the location of the sleeves below the engine block was proper and that its counsel never asked for a continuance to produce evidence on this point until after the conclusion of the trial, its claim that it is entitled to a new trial on the ground of surprise is rejected. See Moylan v Siciliano,* 292 F2d 704, 705 (9th Cir 1961). The evidentiary rulings of the trial judge were justified by the record and do not constitute the reversible error. See F.R. Civ.P. 61. 391 F2d 903 (emphasis supplied).

Similarly, the court in *Moylan v Siciliano,* 292 F2d 704, 705 (9th Cir 1961), affirmed the trial court's denial of motion for a new trial based on appellants' contention that they were so "stunned" by the testimony of appellee's witnesses that they "could not gather their wits together" to advise their counsel of potential rebuttal witnesses:

> Litigants are required to be reasonably alert at trial in the protection of their own interests. If this record could be said to show reasonably genuine surprise

> on the part of appellants, the remedy would have been to ask for a continuance to allow appellants to "gather their wits" and prepare for the presentation of rebuttal testimony. *Cathedral Estates v Taft Realty Corp.*, 2 Cir, 1955, 228 F2d 85. Having failed to do this, and having permitted the cause to go to judgment, it is too late to seek an opening up of the issues, no proper grounds appearing. *Creedon v Loring*, 1 Cir, 1957, 249 F2d 714.

In *Exxon Corp v Exxene Corp*, 696 F2d 544 (7th Cir 1982), a motion for new trial was denied on the basis that when counsel for *Exxene* placed in evidence thirteen trademark registrations for the word "EXXON" that were not listed in the pretrial order, did not deprive Exxon of a fair trial because it had time to prepare an effective rebuttal but failed to do so:

> Exxon argues that the cross-examination and evidence concerning the 13 trademark registrations not listed in the Pre-trial Order violated that Order, was irrelevant and prejudicial, and caught Exxon by surprise. But there was no violation of the actual terms of the Pre-trial Order, and in any event the violation of a Pre-trial Order would not warrant an appellate courts ordering a new trial unless the violation so surprised the party complaining of it that it denied that party a fair hearing. It did not here. Exxon had time to prepare an effective rebuttal dealing with the validity of its own trademarks, a matter on which it is well-informed.

The trial court's ruling in the instant cause of action is consistent with other holdings that a district court is entitled to grant a new trial only if the admission of surprise testimony actually prejudiced the appealing party's case. See *Moore Federal Practice*, Paragraph 59.08 [2] at 5[illegible]1 (2nd Ed 1982).

In the instant cause, not only did petitioners' attorney fail to object to respondent counsel's comments during opening statement or move for a continuance or mistrial, but petitioners also had from six to ten days, including a long weekend, during which to seek whatever rebuttal testimony they thought was necessary.

The issues in this cause can be summed up by the court's language in *Curtis Publishing Company v Butts*, 351 F2d 702, 714 (5th Cir 1965):

> Yet, no objection to any portion of the arguments was raised until Curtis filed its motion for new trial nine days after the jury verdict was returned.
>
> The trial court correctly disposed of this matter in the following language:
>
> It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, (the objection) that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial.
>
> If, as Curtis's counsel now claims, the arguments were, among other things, "grossly improper and inflammatory", "intemperate and inexcusable", "appeals to passion and prejudice", "corruptions of the evidence", "completely unsupported by the evidence", *it is inconceivable to us that they would have delayed so long without raising the slightest hint of an objection.* Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week and recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered but made their claim as an afterthought.

Based on the foregoing, this Court should uphold the Sixth Circuit Court of Appeals' affirmation of the trial judge's denial of new trial on the ground that petitioners were not prejudicially surprised, and that petitioners failed to take remedial action, which is generally construed as a waiver or any objection to the allegedly surprising and prejudicial evidence. (Memorandum Opinion and Order, p. 2).

———o———

CONCLUSION

Petitioners have raised a number of issues for this court without showing the presence of actual prejudice, much less reversible prejudice, or pointing to appellate precedent supporting the abrogation of the well-established rule that parties at trial must be reasonably alert in protecting their own interests. Any surprise incurred by petitioners was a result of their own lack of diligence and mistakes rather than respondent's intentionally failing to reveal information or hiding a defense. Further, petitioners did not suffer the type of prejudice that would warrant the Supreme Court taking drastic action in abrogating the rule as urged by petitioners.

The trial court did not commit error in making its respective rulings, including its denial of petitioners' motion for new trial. The trial court's decisions were within its sound discretion exercised in full knowledge of the circumstances surrounding the lawsuit, including the conduct of both parties which the court several times found less

than praiseworthy but far from meriting the disturbing of the jury verdict of no cause for action in the favor of defendant-respondent.

—o—

RELIEF REQUESTED

For the reasons set forth herein, respondent Corning Glass Works moves the court to deny the plaintiffs' Petition for Writ of Certiorari.

Respectfully submitted,

Buchanan & Bos
Attorneys for Respondent

Jeffrey H. Beusse (P-29869)

Business Address:
Sixth Floor Frey Building
Grand Rapids, MI 49503
(616) 458-1224